Khaw Lay Eong v Majlis Perbandaran Pulau Pinang

APPEAL BOARD (PULAU PINANG) — APPEAL NO LR/PP/25 OF 2011
YEO YANG POH CH, AMIRUDDIN FAWZI BAHAUDIN AND SAN GANAPHATI
21 AUGUST 2013

Local Government — Town and country planning — Application for planning permission — Appeal against granting of planning permission — Application for planning permission for development of 29 storey condominium — Objection by neighbouring land owner — Whether planning authority properly exercised discretion in allowing increase in density to maximum limit — Whether planning authority erred in wrongly considering bumiputera incentives in allowing increase in density beyond maximum limit — Whether height of proposed building incongruous with surrounding — Density and height of building reduced — Bumiputera incentive expressed in Rancangan Struktur Negeri merely discretionary — Bumiputera incentive only to be given effect to if does not run counter to valid planning consideration

Local Government — Town and country planning — Planning considerations — Density — Whether planning authority properly exercised discretion in allowing increase in density to maximum limit — Whether balance of hardship relevant factor to consider in exercising discretion — Whether planning authority erred in wrongly considering bumiputera incentives in allowing increase in density beyond maximum limit

Lots 2626 & 2627 ('the land') were two adjoining pieces of land in Tanjung Tokong, Pulau Pinang. In 2008, planning permission was granted to the previous owner of Lot 2626 to build a seven storey condominium on it. However, that planning permission was not put to use and had lapsed. In 2010, the present planning applicant ('KM applicant') submitted a fresh application ('the KM application') for planning permission for the land to erect a 29 storey luxurious condominium on the land. The KM applicant was the intending developer. The proposed building consisted only of 22 units of condominium. The land was zoned as *'Kawasan Perumahan Am'*. The usual permissible density for that locality was only 15 units per acre (which worked out to be just ten units for the land). Pursuant to its density guidelines, the respondent had discretion to increase that normal density up to a maximum of 25 units per acre (which would give 17 units for the land). Not only did the respondent exercise its discretion to the full extent, it went beyond the maximum density of 25 units per acre, by allowing the KM applicant another increase (of 30%) to 32.5

A units per acre (which yielded 22 units for the land). According to the respondent and the KM applicant, this second increase in density (of 30%) was approved for the reason that the KM applicant was a bumiputera company. They claimed that the approval was given by virtue of the *Rancangan Struktur Negeri Pulau Pinang* ('RSN'), which encourages a local planning authority to B give incentives to bumiputera developers ('the *Bumi* incentive'). The appellant was the owner of a two storey house across the road from the land. The appellant had objected to the KM application. Her objections were dismissed by the respondent and hence this appeal. The appellant's complaint was that the area consisted of low rise residential properties and therefore a 29 storey C building will be incongruous with the surrounding. The KM applicant showed that the surrounding environment of the development site was not free from high rises and that a height of nearly 20 storeys was already not alien to the area.

Held, reducing the permissible density from 32.5 units per acre to 25 units per D acre, limiting the height of the proposed building to not exceeding 20 storey or 200 feet in height and each party bearing its own costs:

(1) The *Bumi* incentive is expressed in the RSN to be something that a planning authority is encouraged to give, and not something that a E planning authority must provide. It is not mandatory. It is loosely framed, almost like a suggestion that is left to the wisdom of a planning authority. It is clearly discretionary. It follows that a planning authority should do so only if the provision of *Bumi* incentive makes 'planning sense' in the circumstances of a case, or (at the very least) when doing so F does not run counter to any valid planning consideration *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 referred; (see para 24).

(2) Allowing a 30% increase in density beyond the maximum permissible G density of 25 units per acre, premised solely on the fact that the KM applicant here was a bumiputera developer, could not be a valid or sensible planning decision by the respondent. It must be set aside (see para 39).

H (3) The first-tier increase (from the normal to the maximum density limit), on the other hand, involved the exercise of discretion by the respondent, a discretion that had to be exercised judiciously (see para 41).

(4) If there is a drastic reduction in the permitted density (and consequently the units of condominium to be built), the KM applicant would have had I to face and deal with third parties with whom the contracts already entered into could not be performed in whole or in part. That was likely to bring considerable hardship to the KM Applicant. The KM applicant had also surrendered its land titles for realienation, in the process of which certain portions of land had been surrendered to the authorities for

the purpose of road widening. Building plans had been approved; and earthworks and piling had started (see para 44).

(5) Where discretion exists (as with the first-tier increase), hardship may in certain circumstances become a relevant factor in deciding whether or not an exercise of discretion ought to be disturbed; since a planning decision frequently involves balancing the competing rights and interests of various parties. The circumstances of the case permitted the board to take into account the considerable hardship that the KM applicant would face, should the density decision of the respondent be revised from 32.5 units to 15 units per acre. Hence, the board did not disturb that part of the respondent's exercise of discretion (see para 45).

(6) The height of the proposed building is indeed a pertinent factor that the respondent did have to take into consideration; and the types (and height) of the buildings existing in the vicinity did have relevance. Considering the fact that the tallest building currently in the vicinity was 19 storey, and bearing in mind that in planning a precedent once set is difficult to depart from, the board limited the height of the proposed building in the present case to not higher than 20 storey, and not taller than 200 feet in total (see paras 63–64).

[Bahasa Malaysia summary

Lots 2626 & 2627 ('tanah') merupakan dua bidang tanah di Tanjung Tokong, Pulau Pinang. Pada 2008, kebenaran merancang diberikan kepada pemilik lama Lot 2626 untuk membina kondominium tujuh tingkat di atasnya. Walau bagaimanapun, kebenaran merancang tersebut tidak digunakan dan telah tamat tempoh. Pada 2010, pemohon perancang sekarang ('pemohon KM') menyerahkan permohonan baru ('permohonan KM') untuk kebenaran merancang untuk tanah tersebut bagi mendirikan 29 tingkat kondominium mewah di atas tanah tersebut. Pemohon KM merupakan pemaju yang bercadang. Bangunan yang dicadangkan hanya terdiri daripada 22 unit kondominium. Tanah tersebut dizonkan sebagai 'Kawasan Perumahan Am'. Kepadatan yang biasanya untuk kawasan tersebut ialah hanya 15 unit setiap ekar (yang kemudiannya menjadi hanya sepuluh unit untuk tanah tersebut). Menurut peraturan kepadatan, responden mempunyai pertimbangan untuk meningkatkan kepadatan normal sehingga menjadi 25 unit setiap ekar (yang memberikan 17 unit untuk tanah tersebut). Bukan sahaja responden menggunakan pertimbangan sepenuhnya, ia melebihi kepadatan maksimum 25 unit setiap ekar dengan membenarkan pemohon KM peningkatan lain (sebanyak 30%) kepada 32.5 unit setiap ekar (yang memberikan 22 unit untuk tanah tersebut). Menurut responden dan pemohon KM, peningkatan kepadatan kedua ini (sebanyak 30%) diluluskan atas alasan bahawa pemohon KM merupakan sebuah syarikat bumiputera. Mereka mendakwa bahawa kebenaran telah diberikan menurut Rancangan Struktur Negeri Pulau Pinang ('RSN'), yang menggalakkan pihak berkuasa perancang memberikan insentif

kepada pemaju-pemaju bumiputera ('insentif Bumi'). Perayu merupakan pemilik rumah dua tingkat di seberang jalan daripada tanah tersebut. Perayu membantah permohonan KM tersebut. Bantahannya ditolak oleh responden dan oleh itu rayuan ini dibuat. Aduan perayu ialah bahawa kawasan tersebut terdiri daripada hartanah perumahan bertingkat rendah dan oleh itu sebuah bangunan 29 tingkat akan menjadi tidak selaras dengan persekitaran. Pemohon KM menunjukkan bahawa keadaan persekitaran di tapak pembangunan tidak bebas daripada bangunan tinggi dan bahawa ketinggian mencecah hampir 20 tingkat adalah tidak asing di kawasan tersebut.

Diputuskan, mengurangkan kepadatan yang dibenarkan daripada 32.5 unit setiap ekar kepada 25 unit setiap ekar, mengehadkan ketinggian bangunan yang dicadangkan kepada tidak melebihi 20 tingkat atau 200 kaki ketinggian dan setiap pihak menanggung kos masing-masing:

(1) Insentif Bumi yang dinyatakan di dalam RSN adalah sesuatu yang pihak autoriti perancangan digalakkan untuk memberi, dan bukannya sesuatu yang pihak autoriti perancangan mesti sediakan. Ianya bukan mandatori. Ianya dirangka secara longgar, ianya lebih kepada satu cadangan yang diserahkan kepada kebijaksanaan pihak autoriti perancangan. Ia dengan jelas mengikut budi bicara. Berikutan dengan itu pihak autoriti perancangan perlu berbuat demikian hanya sekiranya peruntukan insentif Bumi menjadikan 'wajar merancang' di dalam keadaan sesebuah kes atau (sekurang-kurangnya) apabila berbuat demikian tidak bertentangan dengan sebarang pertimbangan perancangan yang sah *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; dirujuk (lihat perenggan 24).

(2) Membenarkan peningkatan 30% dalam kepadatan melebihi kepadatan maksimum yang dibenarkan sebanyak 25 unit setiap ekar, berpremiskan fakta bahawa pemohon KM adalah pemaju bumiputera semata-mata bukanlah satu keputusan perancangan sah atau waras oleh responden. Ia mestilah diketepikan (lihat perenggan 39).

(3) Peningkatan peringkat pertama (daripada had kepadatan normal kepada maksimum), antara lainnya, melibatkan perlaksanaan budi bicara oleh responden, satu pertimbangan yang perlu digunakan secara bijaksana (lihat perenggan 41).

(4) Sekiranya terdapat pengurangan drastik di dalam kepadatan yang dibenarkan (dan seterusnya unit-unit kondominium yang akan dibina), pemohon KM perlu menghadapi dan menguruskan pihak-pihak ketiga yang telah memeterai kontrak-kontrak yang tidak dapat dilaksanakan secara keseluruhan atau sebahagiannya. Ini berkemungkinan membawa kesusahan besar kepada pemohon KM. Pemohon KM juga perlu menyerahkan geran tanahnya untuk pemberimilikan semula, di dalam

proses yang mana sebahagian tanah diserahkan kepada pihak berkuasa bagi tujuan pelebaran jalan. Pelan-pelan bangunan telah diluluskan; dan kerja-kerja tanah dan cerucuk telah bermula (lihat perenggan 44).

(5) Apabila budi bicara wujud (seperti peningkatan peringkat pertama), kerumitan di dalam beberapa keadaan menjadi faktor relevan dalam memutuskan sama ada atau tidak satu pelaksanaan budi bicara perlu dicelah; memandangkan satu keputusan perancangan selalunya melibatkan keseimbangan hak-hak dan kepentingan berlawanan beberapa pihak. Keadaan-keadaan kes ini membenarkan lembaga untuk mengambil kira kesusahan yang akan dialami pemohon KM sekiranya keputusan kepadatan responden diubah daripada 32.5 unit kepada 15 unit setiap ekar. Oleh itu, lembaga tidak mencelah bahagian pelaksanaan budi bicara responden (lihat perenggan 45).

(6) Ketinggian bangunan yang dicadangkan sememangnya satu faktor penting yang perlu diambil kira oleh responden; dan jenis-jenis (dan ketinggian) bangunan yang ada di kawasan tersebut turut mempunyai kaitan. Dengan mempertimbangkan fakta bahawa bangunan tertinggi di kawasan tersebut ialah 19 tingkat dan dengan mengingatkan bahawa di dalam perancangan, satu dapatan terdahulu apabila ditetapkan adalah sukar untuk diubah, lembaga mengehadkan ketinggian bangunan di dalam kes ini kepada tidak melebihi 20 tingkat dan tidak lebih tinggi daripada 200 kaki secara keseluruhan (lihat perenggan 63–64).]

Notes

For a case on application for planning permission, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) para 200.

Cases referred to

Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor [2008] 6 MLJ 704, CA (refd)

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680, CA (refd)

Chong Co Sdn Bhd v Majlis Perbandaran Pulau Pinang [2000] 5 MLJ 130 (refd)

Collis Radio Ltd v Secretary of State for Environment (1975) 29 P & CR 390 (refd)

Kembang Masyur Sdn Bhd lwn Milik Perusahaan Sdn Bhd & lain-lain [2005] 4 MLJ 553, HC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1, FC (refd)

Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)

R (on the Application of Chisnell) v London Borough of Richmond-upon-Thames [2005] EWHC 134 (refd)

Tameside Metropolitan Borough Council v Secretary of State for the Environment Myatt [1984] JPL 180, QBD (refd)

Third World Network Bhd v MPPP (Penang Appeal Board Appeal No LR/PP/24 of 2009) (folld)

Westminster City Council v Great Portland Estates plc [1985] AC 661, HL (refd)

Legislation referred to

Federal Constitution art 13

Town and Country Planning Act 1976 ss 2, 22(2), (4), 23(3), 36(10)

CK Lim for the appellant.
Shamiah (Zuraini and Latiff Khalid with her) for the respondent.
Fong (Heng with him) for the planning applicant.

Yeo Yang Poh Ch:

[1] The board has come to a unanimous decision regarding this appeal. The grounds of decision are set out after the brief narration of material facts below, followed by the orders of the board.

THE RELEVANT FACTS

[2] Lots 2626 and 2627, Sek 1, Bandar Tanjung Tokong (collectively called 'the land'), are two adjoining pieces of land in Tanjung Tokong, Pulau Pinang. Lot 2626 was an empty lot, while a double storey detached house once stood on Lot 2627. In 2008, the previous owner of Lot 2626 had made an application for planning permission to build a seven storey condominium on it. That application was refused by the respondent. Upon appeal, however, the appeal board in 2009 allowed the appeal, and directed that planning permission be granted for a seven storey condominium. However, that planning permission was not put to use by that applicant. It had since lapsed.

[3] In 2010, the present planning applicant, Method 123 Sdn Bhd ('KM applicant'), submitted afresh application for planning permission, this time in respect of the land (ie both Lots 2626 and 2627). The KM applicant is the intending developer of the land (but not the landowner). This application in 2010 ('the KM Application') is for permission to demolish the house on Lot 2627, and to erect a 29 storey luxurious condominium on the land (ie on both Lots 2626 and 2627).

[4] The land is not big, measuring only 0.68 acre in size (in aggregate). The proposed building will consist of 17 levels with one unit of luxurious condominium on each floor, ten levels made up of five duplexes (ie

condominiums of two storey each), and two floors of parking bays. In other words, it will be 29 storey tall, but housing only 22 units of condominium. A

[5] The land is zoned as 'Kawasan Perumahan Am'. There is no express height control in that area. Under the prevailing non-statutory guidelines, the permissible density for the land is 15 units per acre, with discretion for the planning authority (the respondent) to allow up to a maximum of 25 units per acre. The minimum set-back requirement is 20 feet. At the hearing, none of the partieshad raised the issue of 'plot ratio' in relation to the land. This is not surprising, because the practice in Penang (as in the other states, I am given to understand) is to prescribe plot ratio only for commercial developments and not for residential projects, a practice which in my view may need to be relooked at (see also para 55 below). B C

[6] The appellant is the owner of a two storey detached house on Lot 1733, across the road from the land, and bearing postal address No 20, Jalan Bunga Melati, Tanjung Bungah, 11200 Pulau Pinang. Lot 1733 is separated from the landby a narrow road. The appellant qualifies as a 'neighbour' under the Town and Country Planning Act 1976 ('the Act'). The appellant had objected to the KM application. Her objections failed to find favour with the respondent, who granted the planning permission that was applied for. This appeal arises from it. D E

THE 'HEIGHT INCOMPATIBILITY' ARGUMENT

[7] When lodging her appeal, the appellant had listed 22 grounds of appeal, many of which are repetitious or overlapping. At the hearing, learned counsel for the appellant confirmed that he was relying only on four grounds, as eventually set out in his written submissions. F

[8] The appellant raises no safety concern regarding the proposed building, or about its construction. Her complaint is about its height of 29 storey. Her counsel submits that the area consists of lowrise residential properties, and therefore a 29 storey building will be incongruous with the surrounding. At the appellant's request, the panel members visited the site, accompanied by representatives of the respective parties. Essentially, the appellant's contention here is that a high-rise condominium should not be allowed to sit among two storey and three storey houses. It is a 'height incompatibility' argument. G H

[9] At one time on the Penang Island, before high rise condominiums sprang up like mushrooms after a summer rain, one might have found attractive the argument per se that an area with low rise houses (say, houses of one to three storeys) ought not to be 'invaded' by any high-rise building (of taller than, say, four or five storeys). However, we have now long passed that stage of development, as can be seen in much (though not all) of the Penang Island.We I

have long crossed the Rubicon. Penang Island is now dotted with countless examples of high rises in the midst of low rise residential properties.

[10] It is not possible for us to turn back the clock, and visit anew the argument of 'height-incompatibility' without due regard to the reality that the phenomenon being questioned is already here to stay, in many parts of the Penang Island. This argument of incompatibility of height will not, on its own, tilt the balance against allowing a high rise among low rise residences on the island. It is, naturally, also a matter of degree. To be successful, such an argument needs to be supplemented by other persuasive reasons or material planning considerations.

[11] Of course, this is not to say that we should indiscriminately or mindlessly allow high rises of all sorts to sprout among houses throughout the island. There are places (including but not limited to heritage areas and buffer zones) that are, and that must be, free from this kind of incongruence. Clearly too, inareas where no high rise currently exists, its first introduction must not be permitted as a matter of course, but must undergo careful planning scrutiny. Each planning application will therefore have to be considered in the context of its own facts and circumstances. As must this appeal.

[12] In the present case,the KM applicant has shown that the surrounding environment of the development site is not free from high rises. For example, Costa Villa is nine storey (with 54 units of condominium), Dessa Villa is also nine storey (comprising 45 units), and Leisure Bay is 19 storey (having 82 units). These are not far away from the proposed development site. It can thus be said that a height of nearly 20 storeys is already not alien to the area.

[13] The KM applicant hoped to push this point a bit more. It would like us to travel a further distance, to find taller buildings (such as the Fettes Residences) that are located further from the development site than the three condominiums that I have just mentioned. In my view, that will be stretching too far the notion of what is within the 'vicinity of the development site'.

On the other hand, the appellant was quick to remind us that the planning permission previously allowed by the board in respect of Lot 2626 was only for a seven storey building, a quarter (in terms of height) of what is now planned to be built.

Where should a fair balance lie, in this tug-of-war?

[14] The planning permission challenged by the appellant in this appeal permits the erection of a 29 storey building, considerably taller than the tallest building (19 storey) currently in the vicinity of the development site. Is the respondent correct in granting that planning permission? To fully answer this

question, we need to first examine some relevant matters, particularly the issue of density.

THE DENSITY

[15] In the Malaysian context, density is expressed in terms of the number of units of accommodation within an acre (or a hectare) of land. In the instant case, the respondent has allowed the KM applicant a density of 32.5 units per acre, which yields the result of 22 units for the land (since it has a size of 0.68 acre). It is pertinent to see how the respondent has arrived at this figure of density.

[16] The usual permissible density for that locality is only 15 units per acre (which works out to be just ten units for the land). Pursuant to its density guidelines, the respondent has discretion to increase that normal density up to a maximum of 25 units per acre (which would give 17 units for the land). For the instant case, not only did the respondent exercise its discretion to the full extent, it went beyond the 'maximum' density of 25 units per acre, by allowing the KM applicant another increase (of 30%) to 32.5 units per acre (which yielded 22 units for the land).

[17] There are two tiers of increase, the first being an increase from the 'normal' density of 15 units per acre to the 'maximum' density of 25 units per acre. The second involves a further increase (to 32.5 units), beyond the maximum density, rendering some what inapt the use of the word 'maximum'.

[18] Prescribing a normal or usual density along side a maximum density implies that the former should be allowable as a matter of course (save perhaps where there exist special circumstances); and also that the latter is not to be automatically permitted, but ought to be allowable only if there are factors enabling the planning authority to properly exercise its discretion to go beyond the usual density (up to, but not necessarily at, the maximum permissible). This must be so, for otherwise only one density figure need be stipulated.

[19] Therefore, it is reasonable to expect that the respondent's discretion to go above the normal density may only be exercised with good reason, so that its exercise of discretion will be judicious rather than capricious. When asked, however, the respondent (and the KM applicant) could not provide the board with any sound reason why the maximum density ought to be allowed in this case, apart from saying that Tanjung Tokong (within which the development site sits) is an area where maximum density is to be 'encouraged'. But such a 'reason', besides being vague and general, is one that (even if correct) would

apply to all developments in that locality, and is not peculiar to this project. It will not explain why this project ought to be treated as an exception to the normal density limitation.

[20] Nevertheless, for reasons that I will provide later in this decision (see paras 41–46 below), in the circumstances of this case I propose to give the KM applicant the huge benefit of the doubt in relation to the maximum allowance of 25 units per acre for its project. Before coming to that, however, let me deal with the second tier of density — increase (from 25 units to 32.5 units per acre) that was granted by the respondent. Let us first find out how this has come about.

BUMI INCENTIVE—MANDATORY, DIRECTORY OR DISCRETIONARY?

[21] It is a strange thing for the respondent to have gone beyond what, in its own guidelines, is termed the 'maximum' density. That makes nonsense of the word 'maximum'. However, is this just a case of a misnomer; and is there a good reason in planning for producing this oddity?

[22] According to the respondent and the KM applicant, this second increase in density (of 30%) was approved for the reason that the developer in this case (ie the KM applicant) is a 'Bumiputera company'. They claim that the approval is given by virtue of item 4–29 of DS8, L2, of the *Rancangan Struktur Negeri Pulau Pinang* ('RSN'), which encourages a local planning authority to give incentives to Bumiputera developers, as follows:

> memberi insentif kepada individu dan pemaju bumiputera bagi permohonan pembangunan … seperti rebat terhadap caj pembangunan, tambahan ketumpatan pembangunan iaitu 30% ketumpatan dan 10% nisbah plot bagi perniagaan/hotel. '(For ease of reference, I shall call this 'the Bumi Incentive').

It should also be pointed out that the respondent's 'Dasar-dasar dan Garis panduan', a set of *non-statutory* guidelines, contains a provision that repeats a similar stipulation.

[23] This second-tier increase in density, if allowed, will have the effect of going beyond the 'maximum' density. The criterion applied in doing so is one based purely on the personal characteristics of a planning applicant (ie being a Bumiputera developer). Leaving aside for the moment the fact that there is no definition in law of a 'Bumiputera', 'Bumiputera company' or 'Bumiputera developer'; determining whether such a preferential practice might be permissible in planning law invites a prior examination of the following issues:

(a) is the *Bumi* incentive mandatory or directory under the RSN?

(b) must a local planning authority strictly follow whatever is stipulated in a structure plan (in our case the RSN)?

(c) is the *Bumi* incentive justifiable in terms of planning considerations?

(d) can differentiations or exceptions in respect of 'planning regulators' be based solely on the personal characteristics of a planning applicant? and

(e) does it make sense (in terms of planning) for an incentive to be given in a way that will create disparity in planning control within the same locality (or even in respect of the same piece of land)?.

[24] Firstly, it must not escape our notice that the *Bumi* incentive is expressed in the RSN to be something that a planning authority is encouraged to give, and not something that a planning authority must provide. It is not mandatory. It is loosely framed, almost like a suggestion that is left to the wisdom of a planning authority. It is clearly discretionary. It follows that a planning authority should do so only if the provision of *Bumi* incentive makes 'planning sense' in the circumstances of a case, or (at the very least) whendoing so does not run counter to any valid planning consideration.

[25] Then there is also the question of whether or not a planning authority must strictly follow everything that is stated in a structure plan (in our case the RSN). In *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 ('*Gelugor*'s case'), the Federal Court expressed the following opinion regarding stipulations found in a structure plan:

> It is also obvious that the statutory requirement in s 22(2) of the Act, 'to take into consideration' the provisions of the development plan does not mean that the local planning authority must slavishly comply with it. It will suffice if it considers the development plan without incurring the obligation to follow it (at p 51G).

'Development Plan' includes a 'Structure Plan' — see s 2 of the Town and Planning Act 1976 ('the Act').

[26] Despite what the Federal Court has said above, the entitlement of a planning authority to disregard or deviate from the provisions in a structure plan is not a conclusion that may, in my view, be so easily reached. This is because we must not overlook the existence of s 22(4) of the Act, which enjoins a planning authority to refrain from granting a planning permission 'if the development in respect of which the permission is applied for would contravene any provision of the development plan'. In the *Gelugor*'s case, although the Federal Court seemed to be cognisant of s 22(4) (as appears from p 51H of the case report); unfortunately it did not analyse the correlation between s 22(2) and 22(4) of the Act. So, does the Federal Court's view outlined above conflict with the statutory enjoinment found in s 22(4)?

[27] In my view, the Federal Court's dictum on s 22(2) can be harmonised with the provisions of s 22(4). The latter leaves no discretion to the planning authority only where a planning application goes against an express prohibition, restriction or limitation found in a structure plan. Such an application may rightly be rejected by the planning authority. However, when dealing with a permissive or enabling stipulation in a structure plan, the planning authority retains its judicious discretionas to whether or not permission should be granted in any particular case. The planning authority need not, and indeed should not, blindly follow whatever that is said to be permissible under a structure plan. This makes sense, because what is generally permissible in planning must nevertheless be subject to a proper consideration of the characteristics of the locality and the site, and of other relevant circumstances, of a particular case.

[28] Therefore, following the Federal Court's dictum in the *Gelugor*'s case, I hold that permissive or enabling provisions in a structure plan (such as the *Bumi* incentive in our case) need not in any event be slavishly or blindly followed. It remains discretionary.The planning authority must investigate further — to see whether or not the stipulation concerned (in this case the *Bumi* incentive) makes good planning sense generally, and fits into the circumstances of an application specifically. This I will now proceed to do; answering the questions posed in para 23(c)–(e) above together.

IS THE BUMI INCENTIVE A VALID PLANNING CONSIDERATION?

[29] From time to time, the issue of incentives intended for bumiputeras comes up for discussion and scrutiny in planning appeals before this board. There are occasions when some parties (or their representatives) appear reluctant to fully address and debate the issue, seeing it as something 'sensitive'. To my mind, such reluctance is regressive and counter productive. Just as a blind fold will not, now or ever, help one see; a gag on (or reluctance in) discussion of a matter will never promote a better understanding of it, or a better way of dealing with it.

[30] As a social policy, the provision of incentives, assistance or facilitation to a sector of the population who needs the same (usually for a finite period of time only), when properly thought out and fairly implemented, is a laudable thing. It is a hallmark of a democratic and caring society that it does provide assistance to the less fortunate, protect the minority, and help those who may find it tough for the time being to keep pace with the others. It is clear, however, that the provision of incentives must be need-based, and not greed-based. Incentives provided must also be appropriate for addressing the causes (rather than just the symptoms) of any current imbalance.

[31] One cannot hope to truly help a fisherman, in the long run, by giving him fish. One needs to provide him with fishing nets, train him to overcome the challenges of the hard work out at sea, and teach him how to market the fish that he catches with his own labour. Similarly, any incentive designed to address the current imbalance in participation in the field of property development in Malaysia must, inter alia, comprise features that will correct that imbalance in time to come, without the unrealistic reliance on unending assistance.

[32] Furthermore, in the realm of planning, incentives given to a category of planning applicants must make sense from the planning perspectives. In the oft-cited judgment in *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, the Federal Court has held that, for a condition of a planning permission to be valid, it must be 'relevant to the permitted development' (at p 145D); and it must not be done for an ulterior object (ie for a purpose unrelated to planning), 'however desirable that object may seem to it in the public interest' (at p146D). The subject of discourse in *Sri Lempah* was a restrictive condition; but there is no reason why the same principle will not apply in the case of a permissive stipulation.

[33] In other words, a condition or stipulation that has no logical connection with proper planning considerations will not be allowed, even if it is intended for a purpose that is noble or reasonable from another perspective. *A fortiori*, a condition or stipulation that conflicts with legitimate planning controls will certainly not pass muster. In relation to property development, incentives that the respondent could legitimately give must (at the very least) not be contrary or detrimental to proper planning considerations.

[34] It is immediately recognisable that the *Bumi* incentive has no foundation in any planning factors. It is based, rather, on a mixture of social and political considerations. Unfortunately, it quite clearly conflicts with proper planning considerations. A few illustrations and analogies will make this apparent.

[35] It would, for example, surely be seen as nonsensical if a planning authority wishes to allow bumiputera developers a '30% concession' in complying with building standards (such as the standards for building retaining walls, common walls, drains, roads or bridges). No one in his right mind, I hope, will argue that this can constitute a legitimate form of incentive'. It is silly, and dangerous, to suggest that quality and standards can be compromised in order to provide 'incentives' to a class of planning applicants.

[36] What about 'planning regulators' that regulate one aspect or another of a development, such as setbacks, building lines, back lanes, fire breaks, height

control, plot ratio, density, and the like? Will it be proper for 'concessions' to be given to bumiputera developers with regard to planning regulators, so that these may become a form of incentives to them?

[37] For example, along a street where the frontal set back is 40 feet, can a 30% reduction begiven to a *Bumiputera* applicant, so that his setback is reduced to 28 feet, and will be different from the rest? What effect will that have on the building line along that street, and on planning in general?

Or, in an area where monsoon drains are required, will it make sense for a bumiputera developer to be allowed to construct monsoon drains that are 30% less wide and 30% less deep than would be required of a non-bumiputera developer? Would that 30% concession not be absurd as an incentive?

As a third illustration, in a situation where a 'fire break' of 20 feet is the norm, surely it cannot be reduced by 30% (to 14 feet), so as to leave more building space just because the planning applicant happens to be a bumiputera?

This list of analogies can go on.

[38] The above illustrations bring home the resounding fact that it does not make planning sense to tinker with planning regulators, premised merely on the personal attributes of an applicant. Planning regulators, where they have been properly laid down, are there for good reasons. They must apply to all, subject only to such variation that may become necessary due to any peculiar characteristics or needs of the particular development concerned. Planning regulators cannot be varied according to who the applicant is — be she rich or poor, well connected or otherwise. Nor can planning regulators be modified depending on an applicant's gender, race, religion or creed. They cannot be compromised simply in the desire (no matter how well meaning) to provide some form of incentive. To do so will be to commit an error of unreasonableness, of the *Wednesbury* kind (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680). In the Malaysian context, it will also contravene art 8 of the Federal Constitution.

[39] From the above analysis, it is clear to me that allowing a 30% increase in density beyond the maximum permissible density of 25 units per acre, premised solely on the fact that the KM applicant here is a bumiputera developer, cannot be a valid or sensible planning decision by the respondent. It must be set aside. Incentives, where desirable or appropriate, have to be provided in other ways that will not disrupt proper planning measures.

[40] Indeed other types of incentives are available. Tax incentives and exemptions from certain payments are some of the alternative tools that can be applied. In our present case, the respondent could choose to grant the KM applicant a 30% reduction in, or a total exemption from, the development

charge and other payments that would normally be levied. The relevant authorities could also give tax exemptions or tax reliefs to bumiputera developers. There are always legitimate and sensible ways to provide incentives and assistance, ways that do not result in improper planning decisions or render planning regulators pliable in the misguided hands of opportunists.

HARDSHIP AS A RELEVANT CONSIDERATION IN CERTAIN CIRCUMSTANCES

[41] We have seen how the second-tier increase (based on the *Bumi* incentive) is completely unjustifiable at law. The first-tier increase (from the normal to the maximum density limit), on the other hand, involved the exercise of discretion by the respondent, a discretion that it undoubtedly had, and one that, equally unquestionably, had to be exercised judiciously.

[42] When asked why the respondent had allowed the maximum density in this case, DW1 answered that the respondent would always consider allowing more than the normal 15 units per acre, if a planning applicant is able to make some monetary or infrastructure contributions. That could hardly qualify as a proper reason for relaxing a regulatory limit. The KM applicant did also submit that the locality was one in which 'optimum use' of density was encouraged, without however providing the board with anything to substantiate that contention.

[43] The board is not impressed with the explanation given (or rather the lack of it) as to why the respondent had come to exercise its discretion to allow the maximum density of 25 units per acre. Ordinarily, the board would set aside that decision of the respondent too.

[44] In this case, however, we have reflected upon, and taken into account, the difficulties that the KM applicant will face if the density is reduced to 15 units per acre for this project. Those difficulties will arise out of a combination of factors (for some of which the KM applicant cannot be blamed), including the grant of the 'COW' ('Commencement of Work') permit by the respondent, and the actions taken by the KM applicant to contract with third parties for the sale of many of the units of condominium that it is developing. If there is a drastic reduction in the permitted density (and consequently the units of condominium to be built), the KM applicant will have to face and deal with those third parties with whom the contracts already entered into cannot be performed in whole or in part. That is likely to bring considerable hardship to the KM applicant. I further take note of the fact that the KM applicant had surrendered its land titles for realienation, in the process

of which certain portions of land have been surrendered to the authorities for the purpose of road widening. Building plans have been approved; and earth works and piling have started.

[45] Obviously, hardship cannot completely override the law — hence it cannot be relied on to 'legitimise' the second-tier increase of density that has been shown to be unjustifiable at law. But, where discretion exists (as with the first-tier increase), hardship may in certain circumstances become a relevant factor in deciding whether or not an exercise of discretion ought to be disturbed; since a planning decision frequently involves balancing the competing rights and interests of various parties. I say so, on good authorities:

(a) in *Tameside Metropolitan Borough Council v Secretary of State for the Environment Myatt* [1984] JPL 180, it was held that matters of personal hardship could be taken into accountin a planning appeal;

(b) the House of Lords in *Westminster City Council v Great Portland Estates plc* [1985] AC 661 at 670E advised that: 'personal circumstances of an occupier, *personal hardship*, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control. It would be inhuman pedantry to exclude from the control of our environment the *human factor*'. (Emphasis added.);

(c) that statement by the House of Lords has been accepted as correct by our Federal Court in the *Gelugor*'s case (at p 53D); and

(d) in *Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor* [2008] 6 MLJ 704, the Court of Appeal commented as follows (albeit in a different context): 'This public interest consideration was also recently applied by the High Court in *Kembang Masyur Sdn Bhd v Milik Perusahaan Sdn Bhd & lain-lain* [2005] 4 MLJ 553 where a declaration sought by the plaintiff was refused on the ground that 'it would cause inconvenience to society at large as the plaintiff's application required the roads and flyover which has been built to be torn down'. (para 109 at 727E).

[46] I find that the circumstances of this case permit the board to take into account the considerable hardship that the KM applicant will face, should the density-decision of the respondent be revised from 32.5 units to 15 units per acre. The extent of that hardship is to be weighed against what the appellant might suffer if the proposed building is allowed to be constructed (with perhaps a reduced height). When that weighing exercise is carried out, one would realise that what the appellant might suffer if our decision is in-part unfavourable to her will be comparatively far less harsh than the hardship that will be fall the KM applicant if our decision goes the other way.

Bearing that hardship factor in mind, and realising that the respondent did have discretion to allow the maximum density even though it did a bad job at the hearing in providing reasons for its exercise of that discretion, I am not prepared in the present case to say that the respondent's decision to allow the maximum density of 25 units per acrewas completely wrong and unsustainable. Hence, I do not propose to disturb that part of the respondent's exercise of discretion. I hope the KM applicant can appreciate how close the board had come to wanting to do so. It was our weighing of the relative hardships, in seeking to balance opposing interests, that had saved the KM applicant from having the density further reduced to 15 units per acre.

RELATIONSHIP BETWEEN DENSITY AND HEIGHT OF BUILDING

[47] The above cannot yet dispose of this appeal completely, because there is the issue of the height of the proposed building that this board has to consider and decide.

[48] The appellant wants the proposed building reduced to seven storey, as per what had been allowed by the board in 2009. The appellant's counsel argues that the respondent ought to abide by the planning history of the land, and also that the board should show consistency with its decision made in 2009.

[49] I think the appellant's contention is misconceived. First of all, the board in 2009 was dealing with a planning application for a seven storey building. The fact that it allowed that application did not necessarily mean that it would not have permitted a taller building (which was simply not in issue before the board then).

[50] The planning history of a plot of land is no doubt a relevant matter. But it does not have the 'binding effect' that the appellant wishes it to have. As a planning authority, the respondent's 'judgment and discretion is informed but not fettered by the history'. I can do no better than reproduce the following passage from the judgment in *R (on the Application of Chisnell) v London Borough of Richmond-upon-Thames* [2005] EWHC 134 (at para 19):

> … the previous history in connection with the site, including decisions in connection with the site, are material considerations, but anybody having any power to reach a decision in connection with the site at a subsequent date has a discretion. The discretion must be exercised in accordance with their own judgment. The requirement for consistency does not mean that they must be slaves to the previous decision and are in any sense bound by it, or must therefore come to the same conclusion. Their judgment and discretion is informed but not fettered by the history.

[51] Though this board rejects the appellant's submission for putting the bar too high, the issue of the height of the proposed building is of concern to us. Does consideration of the height factor have a rightful place in the determination of density?

[52] Guidelines on density began to be made long before condominium-living became popular in Penang. In the case of *Third World Network Bhd v MPPP* (Penang Appeal Board Appeal No LR/PP/24 of 2009) ('the *Third World Network*'s case'), this board had occasion to consider the relationship between density and the height of a condominium. The board examined the following questions:

> When a residential building density is expressed in terms of a number of units per acre, what does the word 'unit' mean or entail? … Does a 'unit' in this context simply mean whatever is assigned or prescribed to be one unit by the land owner/developer (or by the relevant authorities with corresponding reference to, say, an accompanying title or strata title), without regard to the type, size or height of that unit of building (or of that parcel within a building)? Or, when dealing with building density, should one take into account the type, size and height of each unit when considering the issue of permissible density?

[53] The board then made the following observations in that case:

> If the first construction is the correct one, then, while the horizontal size of a unit of residence will be limited by the land-area, its vertical size is in theory unlimited (where there is no regulation on height restriction). In that event, there is no stopping a developer from erecting a building in which each unit of condominiums is (say) 4 storey … a 21-unit block can then be 84 storey high …, and still be within the permissible building density.
>
> If the first construction is correct, then there will be no difference (in terms of density) whether the proposed building is 7 storey (containing three units per floor), 42 storey (each unit spanning two floors), or 84 storey (each unit occupying four floors). All these three types of building are to be treated as the same, in terms of building density, because each of them houses exactly 21 units of residence as designated by the developer (albeit of vastly different sizes and heights). The development of these three buildings of different types, sizes and heights are to be treated as exactly the same, from density's point of view.
>
> It seems to me obvious that there is something not quite right about that, something quite contrary to common sense, including the common sense of planning.
>
> The second way of construction, on the other hand, makes more planning sense. A building is a three-dimensional thing, not two. When planning a 3-dimensional structure, it does not make sense to interpret criteria in a 2-dimmensional way. The current absence of guideline on height restriction does not mean a prohibition against the proper taking into consideration of height requirements by reason of general planning principles (rather than by virtue of express regulation).

It stands to reason that density should relate to how much build-up structures a 3-dimensional space should be allowed to contain, in order to have a well-organised and healthy living environment. This kind of town planning cannot be achieved if only 2-dimensional criteria are observed. The third dimension cannot be ignored.

None of the three parties (the appellant, the respondent and the KM applicant) was able to refer the board to any legal precedents touching on the proper way to construe the meaning of building density in the context discussed above. My own research, limited by the constraint of time, has also not yielded any directly helpful authorities.

However, faced with a situation where there is more than one way to construe a particular factor or criterion, I do recall the advice of the House of Lords in a planning appeal case, which would lend indirect but invaluable guidance to this Board in choosing to prefer one interpretation over another or over others. This is what Lord Keith had advised in *Fawcett Properties Ltd v Buckingham County Council* [1960] 3 All ER 503 at p 513:

> If a clause may convey several different meanings, it is for the court to say, looking to the general background, surrounding circumstances, subject-matter of discourse and other aids derived from the context of the clause, supplemented not infrequently by certain legal presumptions, what meaning is to be attributed to the clause.

Following that advice, I have in the few preceding paragraphs looked at the general background of our case, the surrounding circumstances, and the subject matter of planning principles and considerations; and I have come to the conclusion that the height factor cannot be ignored when dealing with building density, irrespective of whether height is expressly regulated for the area under scrutiny.

…

I have further considered that guidelines and requirements in planning law, perhaps more so than in other areas of law, ought to be construed purposively. These guidelines and requirements are there for a purpose relating to planning. A literal or rigid interpretation that will not serve the purpose should be avoided.

[54] The board went on to draw the following conclusions:

Hence, … the respondent was wrong in deciding that the proposed 28 storey building satisfies the density requirement of the area. The respondent was wrong to think that the height of building does not matter in considering density, just because of the absence of any regulation regarding height restriction for that area …

… I would also limit the intended development to not higher than 12 storey in total (here I am giving some leeway to the KM applicant in striking a balance). I will further add that the intended building shall not exceed 110 feet in height in total … Though far from what the KM applicant desires, this will already make the proposed building the tallest in its immediate vicinity.

[55] I might add here that, had an appropriate plot ratio been prescribed for

that locality of the project site, it could have resolved the issue of what ought to be the permissible height of the proposed building. But it has been a long standing practice of the respondent to use plot ratio to regulate commercial developments, and density to control residential developments. The reason for this dichotomy is not at all clear. Because the matter was not argued in this appeal, I will presently say no more than that the desirability or suitability of the dichotomy needs to be re-examined. I suspect that before too long the issue will fully feature in another appeal before the board.

[56] I have re-read the board's judgment in the *Third World Network*'s case, and pondered over it in the light of the arguments heard in this appeal. I find no reason to depart from the views expressed in it. During the hearing, I asked the respondent's learned counsel whether, so far as the issues of density and height restriction were concerned, she could find any factual difference to distinguish our present case from the *Third World Network*'s case. She frankly replied that there was none. On the other hand, learned counsel for the KM applicant urged the board not to come to the same conclusion as in the *Third World Network*'s case, because that judgment had (according to him) been overruled by the High Court.

[57] I do not think the KM applicant's counsel is right. What had happened in the *Third World Network*'s case was this. The developer there had filed an application for judicial review of the board's decision. Then the parties entered into negotiations. At the High Court, the neighbour-objector(whose appeal had succeeded before the board) abandoned its original pursuit, and opted instead for a sum of RM250,000 (from the developer) to 'settle' the matter. It entered into a consent order with the developer, to set aside the orders of the board. The local planning authority went along with the settlement. As a result of the settlement, the substantive judicial review application was not heard on merits.

[58] By that settlement, the developer in the *Third World Network*'s case got to do what it wanted, ie to build a tall building at that location. For abandoning its hitherto successful pursuit of objections, the neighbour-objector became richer by RM250,000 (an offer it evidently did not receive until after it had succeeded before the appeal board). The local planning authority happily went along. It appeared to be a happy ending for all.

[59] But there was a fourth, forgotten, party who did not benefit. It was that invisible party of the public at large — see *Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor* [2008] 6 MLJ 704 at p 714 (in para 25 therein). That unseen party, the larger public interest, was sadly ignored, overlooked and disregarded in the settlement. What transpired was, clearly, something completely out of the control of the board. Did it constitute

an abuse of the process of the board, on the part of the neighbour-objector in that case? This is an interesting question that awaits an answer, perhaps on another occasion. For the time being, the present appellant (through her counsel) has expressly represented to the board that she is not, and will not be, seeking any possible financial gain in opposing the KM applicant's plans.

[60] What is beyond doubt is that the reasoning of the board in the *Third World Network*'s case was not gone into, let alone overturned, by the High Court. In those circumstances, it is not correct to say that the grounds of decision in that case had in any way been overruled or disapproved of by the High Court.

[61] Having revisited and reconsidered the grounds of decision in the *Third World Network*'s case, I wish to reaffirm the same, and apply it to the present case. I have heard no argument in this appeal that would make me alter the views there expressed. I therefore hold that it is fitting for the board in this appeal to consider restricting the height of the proposed building, taking into account the surrounding environment.

[62] On this question of the height of the proposed building, it is interesting to note the following testimonies of DW1 (a witness called by the KM applicant):

(a) where a planning applicant requests to be allowed more than the 'normal' density, the respondent will look at what buildings are within 500 metres radius from the site, and see whether the proposed development will be 'comparable' to the surrounding buildings;

(b) when asked why in this instance a 29 storey building was approved, when the tallest building in the vicinity is only 19 storey (the *Leisure Bay*), the witness found it hard to explain;

(c) at one stage, the witness did suggest that 29 storey was approved because the project site is adjacent to Lot 860 on which its owner ('UDA') has plans to carry out development in the future. However, when asked how tall the buildings will be that UDA intends to develop, the witness said that he had no idea;

(d) the witness also said that each case must be considered on its own merits, but he could not explain what the merits of this case were, for it to have received approval for a 29 storey building;

(e) the witness indicated that the respondent was not prepared to take this (29 storey) approval as a binding precedent in future applications by others in the vicinity. He had difficulty explaining why, merely saying that 'we have to look at the social surrounding, and social harmony'; and

(f) when asked whether, since there is no height control in that area, the respondent would grant approval if in our case all the 22 units of condominium were to be duplexes (thus making the building at least 44 storey high), the witness said that that would not be approved, because of the height factor, and because of concerns that later on each duplex unit could be further partitioned into additional and separate units. (The second of these reasons, I hasten to observe, is inconsistent with the fact that some duplexes have been approved, as well as units that each spans an entire floor, in respect of which the same concern about 'partitioning into further units' must likewise exist).

[63] The testimonies of DW1 strongly suggest that the height of the proposed building is indeed a pertinent factor that the respondent does have to take into consideration; and that the types (and height) of the buildings existing in the vicinity do have relevance.

[64] Considering the fact that the tallest building currently in the vicinity is 19 storey, and bearing in mind that in planning a precedent once set is difficult to depart from (see *Collis Radio Ltd v Secretary of State for Environment* (1975) 29 P & CR 390), I would limit the height of the proposed building in the present case to not higher than 20 storey, and not taller than 200 feet in total.

THE HEIGHT REGULATION AS AN INDEPENDENT FACTOR

[65] Traditionally, density is viewed by planners as a control that is necessary in order to correspond with the assessment of the capacity of existing infrastructure and utility provisions in a locality. That is perhaps why the height element is thought to be irrelevant in relation to density. I see no reason why, for the greater good of general planning, this should continue to be the case.

[66] However, should I be wrong in introducing the height element into the determination of density, I will have no difficulty, in the alternative, to treat height restriction as a separate and independent planning regulator, and arrive at the same decision concerning the maximum permissible height of the proposed building. This planning regulator is of general application, without need of any express guidelines for the location concerned, so long as it is applied judiciously, with sound reason and good common sense. I derive support for this proposition from the case of *Chong Co Sdn Bhd v Majlis Perbandaran Pulau Pinang* [2000] 5 MLJ 130 at p 143H.

THE BOARD'S DECISION AND ORDERS

[67] Pursuant to ss 23(3) and 36(10) of the Act, the terms of the planning

permission granted by the respondent in this case are varied in the following manner:

(a) the permissible density is reduced from 32.5 units per acre to 25 units per acre;

(b) the building that the KM applicant may erect on the land shall not exceed 20 storey in total, and shall also not exceed 200 feet in height in total;

(c) any term, condition or stipulation contained in the planning permission that is inconsistent with these orders is deemed to have been set aside to the extent of such inconsistency; but the remaining terms, conditions and stipulations of the planning permission shall remain valid and effective;

(d) the respondent shall be entitled to make such consequential changes to the terms, conditions and stipulations contained in the planning permission that may be necessitated by reason of the variations made by the orders herein to the said planning permission, provided that the changes so made are not inconsistent with these orders;

(e) the KM applicant shall be required to re-submit new building plans for the respondent's approval,and such plans shall be drawn and approved in compliance with the planning permission as varied by the orders made herein;

(f) all parties shall be at liberty to apply to this board for further orders or directions, in the event of any disagreement or dispute regarding the orders made herein or their implementation, or otherwise in relation to the planning permission granted in this case; and

(g) each party shall bear its own costs.

[68] This decision was made on 6 August 2013; and communicated to the parties on 21 August 2013.

Permissible density reduced from 32.5 units per acre to 25 units per acre, height of proposed building limited to not exceeding 20 storey or 200 feet in height and each party to bear its own costs.

Reported by Kanesh Sundrum